IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

DURRELL SIMS,

Plaintiff,

v. CASE NO. 4:16cv49-RH-CAS

MARK S. INCH, SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS,

Defendant.

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OPINION ON THE MERITS

In *Holt v. Hobbs*, 135 S. Ct. 853 (2015), the Supreme Court held that the Religious Land Use and Institutionalized Persons Act ("RLUIPA") entitled a prisoner to grow a half-inch beard as required by his religion. This case presents the question whether RLUIPA entitles a prisoner to grow a fist-length beard. Because a fist-length beard can be accommodated as easily as a half-inch beard—or nearly so—this order holds that the answer is yes. This order sets out the court's findings of fact and conclusions of law following a bench trial.

I. Introduction

Congress adopted RLUIPA in 2000 to push back against judicial decisions it deemed insufficiently protective of religious freedom. The statute prohibits a prison from imposing a "substantial burden" on a prisoner's "religious exercise" unless the burden "is in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

The plaintiff Durrell Sims is an inmate in the Florida Department of Corrections. One tenet of his Muslim religion is that he must grow a fist-length beard and trim his moustache. The Department's policy allows an inmate to grow a half-inch beard or no beard at all—nothing in between. And the policy applies also to moustaches—an inmate can have a moustache only if he has a beard, and the moustache cannot be trimmed other than to half an inch. Mr. Sims thus cannot abide by this tenet of his religion and the Department's policy at the same time.

Mr. Sims filed this action for injunctive relief asserting the beard policy, as applied to him, violates RLUIPA. As proper under *Ex parte Young*, 209 U.S. 123 (1908), the defendant is the Secretary of the Department of Corrections in his official capacity. For convenience, this order sometimes refers to the defendant as the Department.

II. Factual Background

A. The Witnesses and Their Credibility

Three witnesses testified for the Department: Carl Kirkland, the Department's Deputy Director of Institutional Operations; James Upchurch, a prison-administration expert and former Assistant Secretary in the Department; and James Coker, the Warden of Wakulla Correctional Institution. Each has significant experience working in or administering one or more of the Department's facilities in Florida, but none has experience working in or administering a facility that allows inmates to grow beards longer than half an inch.

Mr. Sims testified and also called an expert witness, Tim Gravette. Mr. Gravette has experience as a correctional officer and as an associate warden in the Federal Bureau of Prisons. Mr. Gravette has not served in the Florida Department of Corrections but does have experience in a federal facility in Florida and in facilities that allow inmates to grow beards longer than half an inch.

On issues related to searching inmates with beards longer than half an inch, the risks posed by such beards, and the difficulty of accommodating such beards, I credit Mr. Gravette's testimony over the conflicting testimony of the Department's witnesses.

B. Mr. Sims and His Religion

Mr. Sims has been in the Department of Corrections since 2006. He converted to Islam in 2007. The Department allows Mr. Sims to practice his faith in many ways. Mr. Sims resides in a faith-and-character-based dormitory. He prays five times a day, attends study classes and prayer services, reads Islamic texts, dons a kufi, and keeps a prayer rug. He uses the first name Mohammed. He strives to maintain a diet consistent with his religious beliefs. He observes Ramadan by eating his meals before sunrise and after sunset and by praying more frequently with his peers.

Mr. Sims's religion requires him to grow a fist-length beard and to trim his moustache. For Mr. Sims, not complying with this requirement is a punishable sin. There is only one exception. He may trim or shave his beard if necessary for his health or safety—for example, if he develops a skin condition that cannot be treated while keeping the beard.

Mr. Sims has been a near-model inmate. In 13 years, he has received only one disciplinary report—for nonviolent conduct related to a court proceeding.

C. The Department's Beard Policy Over Time

When Mr. Sims was initially incarcerated, the Department's policy required inmates to be clean-shaven, with one exception: an inmate with a medical reason not to shave was allowed to grow a quarter-inch beard. There were no religious

exceptions. Mr. Sims attempted to challenge this policy by filing a grievance but did not file a lawsuit.

In 2015 the Supreme Court decided *Holt*, establishing an inmate's right to a half-inch beard as a religious exercise. Largely to avoid a case-by-case beard-approval process, the Department changed its policy to allow all inmates to grow half-inch beards. An inmate in a Department facility now may grow a half-inch beard or remain clean-shaven—nothing in between. Despite the Department's pre-*Holt* concerns, the change did not have adverse consequences.

When the Department changed its policy, Mr. Sims grew a half-inch beard.

III. Mr. Sims's Burden of Proof under RLUIPA

To prevail on his RLUIPA claim, Mr. Sims must first show that the half-inch-beard policy substantially burdens his sincere religious exercise. *See Holt*, 135 S. Ct. at 862; 42 U.S.C. § 2000cc-1(a).

The Department does not dispute Mr. Sims's sincerity or that growing a beard is a religious exercise. But the Department does dispute that its policy *substantially burdens* that exercise. The Department points to Mr. Sims's statement that he can shave if necessary for his health or safety.

Determining the contours of a religious exercise is the province of the religious adherent, not the state. Mr. Sims's religion calls for a fist-length beard all the time, with a narrow exception for circumstances that do not now exist. The

exception says very little about whether precluding Mr. Sims from having the required beard substantially burdens his religion.

A different example shows the fallacy of the Department's argument. Most religious adherents pray, but few pray constantly. That an adherent chooses not to pray every minute of every day does not mean prayer is not a fundamental part of the religion. If the Department banned all prayer, was challenged by a prisoner under RLUIPA, and said the prayer ban did not impose a substantial burden because, after all, the prisoner's religion did not require prayer every minute of every day, the argument would go nowhere. So too with the argument that Mr. Sims's religion does not necessarily require him to have a beard every minute of every day.

The Department's policy substantially burdens Mr. Sims's religious exercise. *Cf. Holt*, 135 S. Ct. at 862 (rejecting the assertion that the burden on an inmate's religious exercise of growing a beard was "slight" because his religion would "credit" him for attempting to follow his religious belief, even if he was unsuccessful).

IV. The Department's Burden of Proof in Response

Because Mr. Sims has shown the Department's policy substantially burdens his religious exercise, the burden is on the Department to show that its refusal to allow Mr. Sims to grow a fist-length beard is the least restrictive means of

furthering a compelling government interest. *Id.* at 863; 42 U.S.C. § 2000cc-1(a). The Department must satisfy this test through the policy's application *to Mr. Sims himself*. *See Holt*, 135 S. Ct. at 863; *see also Smith v. Owens*, 848 F.3d 975, 981 (11th Cir. 2017). In assessing the Department's reasons, the court must consider the harm it will suffer from granting Mr. Sims an exemption and " 'look to the marginal interest in enforcing' the challenged government action" in the particular context. *Holt*, 135 S. Ct. at 863 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014)).

RLUIPA "does not give courts carte blanche to second guess the reasoned judgments of prison officials." *Knight v. Thompson*, 797 F.3d 934, 945 (11th Cir. 2015). Congress "anticipated . . . that courts entertaining complaints under [RLUIPA] would accord 'due deference to the experience and expertise of prison and jail administrators.' " *Cutter v. Wilkinson*, 544 U.S. 709, 716-17 (2005) (quoting 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sens. Hatch and Kennedy)). But the court need not defer to speculative or exaggerated fears or after-the-fact rationalizations. *Knight*, 797 F.3d at 945; *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013).

In *Knight*, the Eleventh Circuit upheld Alabama's short-hair policy against a RLUIPA challenge by specific inmates. The court did so based on the record and findings in that case. That was not, however, a holding that a ban on long hair

never violates RLUIPA as applied to a specific inmate, let alone a holding that a ban on fist-length *beards* never violates RLUIPA as applied to a specific inmate. That *Knight* is not controlling on the different evidence, different findings, and different circumstances involved in the case at bar is confirmed by the Eleventh Circuit's later decision in *Smith*. There the court remanded a Muslim inmate's RLUIPA beard-length claim for an "individualized, context-specific inquiry"; the court did not say *Knight* settled the issue. *Smith*, 848 F.3d at 981.

V. The Department's Asserted Interests

The Department asserts its half-inch-beard limitation furthers interests that can be divided into five categories. For the most part, the interests are compelling. *See Holt*, 135 S. Ct. at 863-64 (holding government had a compelling interest in preventing prisoners from concealing contraband and disguising their identities); *Knight*, 797 F.3d at 944 (holding government had compelling interests in security, discipline, hygiene, and safety); *Linehan v. Crosby*, 346 F. App'x 471, 473 (11th Cir. 2009) (unpublished) (holding government has a compelling interest in keeping costs down). But the half-inch-beard policy furthers these interests only marginally, and the policy is not the least restrictive means of furthering the interests.

A. Security

The first interest is security. Officers must be able to find any contraband in an inmate's possession. The Department says an inmate can hide contraband in a beard longer than half an inch. Before *Holt*, the Department said, with equal alarm, that an inmate could hide contraband even in a half-inch beard. Now, as then, the concern is exaggerated.

Officers routinely search inmates. Under the Department's current practice, an officer visually inspects an inmate's beard for contraband—handcuff keys, razors, or other small objects—without having to use the officer's hands. Officers have sometimes asked Mr. Sims to run his own hands through his beard as part of a search. To complete a search, an officer stands behind the inmate, runs the officer's hands over the inmate's body, and examines any items in the inmate's possession. An officer may also look in, but not touch, an inmate's mouth.

The Department says the same approach would not work for fist-length beards. The Department says an officer would search a fist-length beard this way: with the inmate facing away from the officer, the officer would use the officer's own hands to reach around the inmate's face and physically search through the inmate's beard. This would expose the officer or inmate to risk—the officer would be reaching blindly and could be injured by a razor blade or other object or could

poke an inmate in the eye or mouth. Hygiene might be compromised. An inmate might react violently.

The Department's proposed method is not necessary and indeed is not how it is routinely done in the many facilities that allow fist-length or longer beards. According to Mr. Gravette, who has experience actually searching long beards, an effective way to search a beard is to have the inmate bend forward, flip his beard to the front or to the side, rub his own hands through the beard, and have the officer visually inspect the beard. This may be accomplished either before or after the officer conducts a pat-down search from behind the inmate. This adds perhaps five seconds per search. The Department asserts this is an unacceptable "self-search," but it is not; it is an effective method for locating contraband that may be hidden in a beard. The method has been used routinely in the many facilities that allow beards of fist length or longer. The Department has offered no evidence that the method has ever failed to locate contraband hidden in an inmate's beard.

In any event, the likelihood of an inmate hiding valuable or dangerous contraband in a beard is low. The point of hiding contraband is to hide it. Contraband in a beard may fall out and thus may be discovered by other inmates or by officers, with or without a search. An inmate is much more likely to put valuable or dangerous contraband in a shoe, a sock, or another more secure location already available to him. Despite that greater risk, and as the Supreme

Court noted in *Holt*, 135 S. Ct. at 865-66, correctional authorities do "not require inmates to go about bald, barefoot, or naked."

Contraband has sometimes been hidden in a beard, but the Department has exaggerated the risk. Prohibiting an inmate from growing a religiously required beard is not the least restrictive means of furthering the Department's compelling interest in security.

B. Uniformity

The second interest the Department invokes in support of the half-inch-beard policy is uniformity. The Department runs its facilities in a para-military manner. Structure and uniformity in Department facilities promote order and discipline. Granting an exception to a uniform rule may undermine order and discipline. From an inmate's perspective, obtaining an exception to a uniform rule may be a desirable benefit—and other inmates may seek the same benefit or react negatively when it is denied. This can lead to conflict among inmates or between inmates and officers. To address this, the Department says if it must accommodate Mr. Sims, it will change its beard-length policy for all inmates at all facilities—just as, in response to *Holt*, the Department changed its no-beard policy for all inmates at all facilities.

The whole point of RLUIPA is to require accommodation of religion—to allow an inmate an exception to an otherwise-uniform policy that substantially

burdens the inmate's religious exercise. A government's interest in uniformity, without more, is rarely compelling enough to defeat a RLUIPA claim. And in any event, the Department has itself identified a viable alternative that achieves its interest in uniformity: the Department can allow every inmate the option of having a fist-length beard.

The Department says not all fists are the same size, and indeed they are not. The Department says a policy allowing fist-length beards will be difficult to administer, but Mr. Gravette demonstrated the contrary. A prisoner can be required to grasp his beard in his fist with his thumb and pointer finger at his chin; if the beard sticks out beyond the little finger on the other side, it is too long. Facilities in other states have successfully followed this approach. *See Ali v. Stephens*, 822 F.3d 776, 791 n.11 (5th Cir. 2016). Alternatively, the Department could set a maximum length—perhaps three-and-a-half or four inches. The Department's complaint about the difficulty of determining compliance with a fist-length policy is precisely the kind of make-weight justification that RLUIPA most clearly forecloses.

In sum, the Department's interest in uniformity is probably not compelling. Even if it is, the interest would be compromised very little by granting Mr. Sims an exception to the half-inch-beard policy. And the interest would be compromised not at all by adopting an across-the-board policy allowing fist-length beards.

Prohibiting Mr. Sims from exercising his religion by growing a fist-length beard is not the least restrictive means of achieving any interest in uniformity.

C. Gang Identification

The third interest the Department invokes in support of the half-inch-beard policy is prohibiting inmates from identifying themselves as gang members. The Department says inmates could sculpt or shape or wear their beards in a manner denoting affiliation with a specific gang.

The interest in prohibiting prisoners from identifying themselves as gang members is compelling. And the suggestion that beards could be used as a means of identification is not as farfetched as it sounds at first blush. Prisoners use even minute variations in dress or appearance to signal gang affiliation—for example, by leaving a shoe untied or turning a shoe's tongue a certain way. For this reason, the Department does not allow inmates to uniquely sculpt or shape their half-inch beards.

The Department could adopt the same policy for fist-length beards. Prohibiting Mr. Sims from growing a fist-length beard is not the least restrictive means of furthering the Department's compelling interest in reducing gang identification.

D. Identification of Inmates

The fourth interest the Department invokes in support of the half-inch-beard policy is identification of inmates, both within and outside the facility. The Department says allowing longer beards would interfere with its interests in several ways.

First, the Department says some inmates can be identified by facial scars, tattoos, or other markings. The Department says these can be seen through a half-inch beard but cannot be seen through a fist-length beard. Before *Holt*, the Department said these could not be seen through a half-inch beard, either. In any event, if limiting beards to half an inch improves identification of inmates, the improvement is slight—and the improvement is none for inmates like Mr. Sims who have no facial scars, tattoos, or other markings. Prohibiting Mr. Sims from exercising his religion by growing a fist-length beard is not the least restrictive means of achieving any interest in identifying inmates through facial scars, tattoos, or other markings.

Second, within a facility, inmates wear identification cards with photographs. These are important. Facilities house many inmates, have high correctional-officer turnover, and often rotate officers from one assignment to another. All the while, officers must be able to identify the inmates in their charge. When an inmate grows or shaves a beard, a prior photograph is no longer as useful.

But there is an easy solution: take another photograph. *See Holt*, 135 S. Ct. at 864-65 (condoning a dual-photograph method as a less restrictive alternative).

In any event, the Department's own current practice shows that the harm from an out-of-date photograph is not as dire as the Department suggests. The Department periodically updates an inmate's identification card with a new photograph. But the Department does not update an inmate's photograph just because he grows or shaves a beard. Quite the contrary. After Mr. Sims grew his half-inch beard, the Department did not take a new photograph, but when the regular time came for a new photograph, the Department required Mr. Sims to shave his beard so that the photograph would show him clean-shaven. Mr. Sims was then allowed to grow the beard back without being photographed. The Department plainly does not think it necessary to have an accurate current photograph on an inmate's identification card.

Third, the Department says an inmate with a beard can quickly shave it to alter his appearance to avoid identification by officers as the person who engaged in misconduct within the facility. This is as true for a half-inch beard as for a fist-length beard. In any event, as Mr. Gravette testified, unsolved who-done-it mysteries in prisons are very rare. Moreover, immediately shaving a beard after an incident within a facility is more likely to incriminate an inmate than to exonerate

him. In sum, this Department argument is a make-weight of the kind RLUIPA does not countenance.

Fourth, and only a little more plausibly, the Department says an inmate with a beard who escapes from a facility can quickly shave to avoid identification by law enforcement officers or members of the public who have seen only the inmate's bearded photograph. An easy solution—one the Department apparently already employs—is to retain a clean-shaven photograph. And in any event, modern technology allows easy manipulation of photographs to show a subject with or without a beard. The Department has not shown that any escaped prisoner has ever been captured because the prisoner was identified by a member of the public based on a prison photograph—or that any escaped prisoner has ever avoided detection by shaving a beard.

Prohibiting Mr. Sims from growing a fist-length beard is not the least restrictive means of furthering the Department's compelling interest in identifying inmates.

E. Department Resources

The fifth interest the Department invokes in support of the half-inch-beard policy is the need to conserve the Department's limited resources. This is a compelling interest worthy of emphasis. Every dollar available for correctional-officer salaries or prisoner medical care or a host of other needs is important.

But allowing fist-length rather than half-inch beards will have very little effect on Department resources. A few more seconds to search an inmate. Perhaps a few more photographs.

The analysis might be different if, as the Department asserts, searching an inmate with a fist-length beard would take three or four minutes longer than searching an inmate with a half-inch beard or no beard at all. As set out above, the Department is wrong about this. An effective search will take only a few extra seconds.

VI. Actual Experience with Beard Policies

Before *Holt*, when the Department's former no-beard policy was challenged, the Department said the same interests it now invokes in support of the half-inch-beard policy could be served only by banning beards entirely, save only for prisoners with medical issues that precluded shaving. *See Watkins v. Jones*, No. 4:12-cv-215-RH/CAS, 2015 WL 5468648, at *2 (N.D. Fla. Sept. 15, 2015), *aff'd sub nom. Watkins v. Sec'y, Fla. Dep't of Corr.*, 669 F. App'x 982 (11th Cir. 2016). Now that the Department has experience with half-inch beards, its witnesses generally concede that the change has been positive and has not caused significant problems.

There is no reason to believe the result will be different this time. Fist-length beards, like half-inch beards, will not compromise the Department's compelling

interests—or even its other less-than-compelling legitimate interests. *See Ali v. Stephens*, 822 F.3d 776, 790 (5th Cir. 2016) (concluding that Texas's allowance of a religious accommodation for half-inch beards undermined its position denying an accommodation for fist-length beards).

It bears noting, too, that the Department's half-inch-beard policy places the Department squarely in the minority. The majority of states, the Federal Bureau of Prisons, and the District of Columbia all allow prisoners to grow fist-length beards, either across the board or as a religious accommodation. There is no evidence that any significant harm has resulted.

VII. Conclusion

In applying RLUIPA, context matters. *See Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005). Mr. Sims is a devout Muslim whose conduct in prison has been exemplary. He wishes to grow a beard in accordance with his religion, and doing so would pose no security, misconduct, or flight risk. The Department has not shown that prohibiting him from growing a fist-length beard and trimming his moustache is the least restrictive means of furthering a compelling government interest. So Mr. Sims has a right under RLUIPA to do these things. If Mr. Sims abuses the right, the issue can be revisited. *See Holt*, 135 S. Ct. at 867.

Based on the findings of fact and conclusions of law set out in this order,

IT IS ORDERED,

1. The defendant Secretary of the Florida Department of Corrections must allow the plaintiff Durrell Sims to grow a fist-length beard and to trim his moustache in accordance with his religious beliefs.

2. This injunction binds the Secretary and his officers, agents, servants, employees, and attorneys—and others in active concert or participation with any of them—who receive actual notice of this injunction by personal service or otherwise.

3. The clerk must enter judgment and close the file.

SO ORDERED on August 23, 2019.

s/Robert L. Hinkle
United States District Judge